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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

10 Mona Lisa Lacy,

No. CV-21-01908-PHX-JAT

11 Plaintiff,

**ORDER**

12 v.

13 Commissioner of Social Security  
14 Administration,

15 Defendant.

16 Pending before the Court is Plaintiff Mona Lisa Lacy's appeal from the Social  
17 Security Commissioner's denial of disability insurance ("DI") benefits under Title II of the  
18 Social Security Act, 42 U.S.C. § 401 *et seq.* (Doc. 1). The appeal is fully briefed (Docs.  
19 20; 23; 27). The Court now rules.

20 **I. BACKGROUND**

21 Plaintiff filed an application for DI benefits in September of 2014, alleging a  
22 disability onset date of September 4. (Doc. 12-6 at 5). Plaintiff's application was denied at  
23 the initial stage, upon reconsideration, and by an administrative law judge ("ALJ") after a  
24 hearing. (Docs. 12-4 at 3, 14, 17, 32; 12-3 at 34). The Social Security Administration  
25 ("SSA") Appeals Council denied Plaintiff's request for review of the ALJ's decision. (Doc.  
26 12-3 at 2). Plaintiff appealed the Commissioner's final decision under 42 U.S.C. § 405(g).  
27 (See Doc. 12-14 at 7).

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1       Her appeal came before Judge Stephen P. Logan of this Court, who initially ordered  
 2 the matter remanded for an award of benefits. (*Id.* at 18). Upon reconsideration, however,  
 3 Judge Logan amended his initial order to instead remand the matter for further development  
 4 of the record. (*Id.* at 21, 24). On remand the ALJ again denied Plaintiff's claim, and the  
 5 Appeals Council found no basis for changing the ALJ's decision. (Doc. 12-13 at 2-3).  
 6 Plaintiff then timely filed this action seeking review of the Commissioner's final decision.

7           **a. The Disability Determination Process**

8       To be eligible for Social Security DI benefits, a claimant must, among other  
 9 requirements, show that she is "under a disability" which existed while she was "insured  
 10 for" such benefits. 42 U.S.C. § 423(a)(1). A "disability" is in an "inability to engage in any  
 11 substantial gainful activity by reason of any medically determinable physical or mental  
 12 impairment which can be expected to result in death or which has lasted or can be expected  
 13 to last for a continuous period of not less than 12 months." *Id.* § 423(d)(1)(A). The SSA  
 14 has created a five-step process for an ALJ to determine whether a claimant is disabled. *See*  
 15 20 C.F.R. § 404.1520(a)(1). Each step is potentially dispositive. *See id.* § 404.1520(a)(4).

16       At step one the claimant is not disabled if she is doing substantial gainful activity.  
 17 *Id.* § 404.1520(a)(4)(i). At step two the claimant is not disabled if she does not have a  
 18 "severe impairment," i.e., "any impairment or combination of impairments which  
 19 significantly limits . . . physical or mental ability to do basic work activities." *Id.* §  
 20 404.1520(a)(4)(ii), (c). At step three the claimant is disabled (and entitled to benefits) if  
 21 her impairment "meets the duration requirement" and "meets or equals" an impairment  
 22 listed in Appendix 1 to Subpart P of 20 C.F.R. Part 404. *See id.* § 404.1520(a)(4)(iii).

23       If not, the ALJ will determine the claimant's "residual functional capacity" ("RFC")  
 24 by considering "all the relevant evidence" including impairments, "any related symptoms,"  
 25 and resulting "physical and mental limitations" to determine "the most [the claimant] can  
 26 still do despite [her] limitations." *Compare id.* § 404.1520(a)(4), *with id.* § 416.945(a)(1).  
 27 At step four the claimant is not disabled if, considering the RFC and the physical and  
 28 mental demands of the claimant's past relevant work, she can still perform such work. *Id.*

1       § 404.1520(a)(4)(iv), (f). If the claimant cannot perform (or does not have) past work, at  
 2 step five the claimant is not disabled if, considering her RFC, “age, education, and work  
 3 experience,” she can adjust to other work that exists “in significant numbers in the national  
 4 economy.” *Compare id.* § 404.1520(a)(4)(v), (g)(1), *with id.* § 404.1560(c). But if the ALJ  
 5 finds the claimant cannot adjust to other work, she is disabled. *See id.* § 404.1520(a)(4)(v).

6           **b. The ALJ’s Findings**

7       The ALJ first found that Plaintiff was last insured for DI benefits on December 31,  
 8 2014. (Doc. 12-13 at 14). At step one the ALJ found that Plaintiff had not engaged in  
 9 substantial gainful activity between her disability-onset date and her last-insured date. (*Id.*  
 10 at 15). At steps two and three the ALJ found that Plaintiff had a number of severe  
 11 impairments, including migraines and fibromyalgia, but found that these impairments did  
 12 not meet or medically equal the severity of a listed impairment. (*Id.* at 15–19). The ALJ  
 13 then found that Plaintiff had the RFC to perform light work with some limitations. (*Id.* at  
 14 19). At step four the ALJ found that Plaintiff could not perform any past relevant work.  
 15 (*Id.* at 40). At step five the ALJ found, based on the testimony of a vocational expert, that  
 16 Plaintiff could adjust to other work that existed in significant numbers in the national  
 17 economy. (*Id.* at 40–41). The ALJ concluded that Plaintiff was not disabled between her  
 18 alleged onset date and her last-insured date. (*Id.* at 41).

19           **II. LEGAL STANDARD**

20       This Court may not overturn the ALJ’s denial of disability benefits absent legal error  
 21 or a lack of substantial evidence. *Luther v. Berryhill*, 891 F.3d 872, 875 (9th Cir. 2018).  
 22 “Substantial evidence means . . . such relevant evidence as a reasonable mind might accept  
 23 as adequate to support a conclusion.” *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017)  
 24 (citation omitted). On review, the Court “must consider the entire record as a whole,  
 25 weighing both the evidence that supports and the evidence that detracts from the [ALJ’s]  
 26 conclusion, and may not affirm simply by isolating a specific quantum of supporting  
 27 evidence.” *Id.* (citation omitted). The ALJ, not this Court, draws inferences, resolves  
 28 conflicts in medical testimony, and determines credibility. *See Andrews v. Shalala*, 53 F.3d

1 1035, 1039 (9th Cir. 1995); *Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984). Thus,  
 2 the Court must affirm even when “the evidence admits of more than one rational  
 3 interpretation.” *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). But by the same token  
 4 the Court “review[s] only the reasons provided by the ALJ in the disability determination  
 5 and may not affirm the ALJ on a ground upon which [s]he did not rely.” *Garrison v. Colvin*,  
 6 759 F.3d 995, 1010 (9th Cir. 2014).

7 **III. ANALYSIS**

8 Plaintiff argues that the ALJ erroneously discredited Plaintiff’s statements  
 9 concerning the intensity, persistence, and limiting effects of her symptoms and also  
 10 erroneously gave minimal weight to the opinion of Plaintiff’s treating rheumatologist.  
 11 Defendant argues that the ALJ gave legally sufficient reasons supported by substantial  
 12 evidence for each determination. The Court will consider each issue in turn.

13 **a. Subjective Symptom Testimony**

14 Plaintiff argues that the ALJ failed to adequately support her decision to discount  
 15 Plaintiff’s testimony regarding the severity of her symptoms. To discredit subjective  
 16 symptom testimony an ALJ must first “determine whether the claimant has presented  
 17 objective medical evidence of an underlying impairment which could reasonably be  
 18 expected to produce the pain or other symptoms alleged.” *Lingenfelter v. Astrue*, 504 F.3d  
 19 1028, 1036–37 (9th Cir. 2007) (cleaned up). Once a Plaintiff satisfies this test, provided  
 20 there is “no evidence of malingering, the ALJ can reject the claimant’s testimony about the  
 21 severity of her symptoms only by offering specific, clear and convincing reasons for doing  
 22 so.” *Id.* (cleaned up).

23 Here, the ALJ found that Plaintiff’s medically determinable impairments could  
 24 reasonably be expected to produce her alleged symptoms, and did not make a finding that  
 25 she was malingering. (Doc. 12-13 at 23). But the ALJ concluded that Plaintiff’s statements  
 26 regarding the severity of her symptoms were “not entirely consistent” with medical and  
 27 other evidence in the record and consequently found her less limited than she had alleged.  
 28 (*Id.* at 23, 28, 39). Because the ALJ did not make a finding that Plaintiff was malingering,

1 the Court must determine whether the ALJ gave specific, clear, and convincing reasons for  
 2 partly discrediting Plaintiff's symptom testimony.

3 An adverse credibility determination is sufficiently specific if the ALJ identifies  
 4 "what testimony is not credible and what evidence undermines the claimant's complaints."  
 5 *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citation omitted). In assessing  
 6 credibility an ALJ may consider, among other factors, "(1) ordinary techniques of  
 7 credibility evaluation, such as the claimant's reputation for lying, prior inconsistent  
 8 statements concerning the symptoms, and other testimony by the claimant that appears less  
 9 than candid; (2) unexplained or inadequately explained failure to seek treatment or to  
 10 follow a prescribed course of treatment; and (3) the claimant's daily activities." *Id.* at 1163  
 11 (citations omitted). Using "ordinary techniques of credibility evaluation" an ALJ may  
 12 "discredit the claimant's allegations" so long as the ALJ "makes specific findings that are  
 13 supported by the record." *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991) (cleaned  
 14 up). Or, put more succinctly, the "specific, clear, and convincing" standard is satisfied  
 15 where the "ALJ's rationale is clear enough that it has the power to convince." *Smatt v.  
 16 Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022).

17 Plaintiff claimed that her ability to work was limited by muscle spasms, stiffness,  
 18 and daily migraines, and also by constant pain which prevented sleep and interfered with  
 19 household tasks. (Docs. 12-3 at 52; 12-7 at 15–17; 12-13 at 70, 75). She claimed that her  
 20 pain or stiffness prevented her from sitting for more than 45 minutes, standing for more  
 21 than 20 minutes, or lifting more than 10 pounds. (Doc. 12-3 at 62–63). She also testified  
 22 that she spent most of each day lying down and suggested that she was only able to walk  
 23 as far as her mailbox. (*See id.* at 63–7). The ALJ gave a number of specific, clear, and  
 24 convincing reasons for discrediting Plaintiff's subjective symptom testimony.

25 **i. Inconsistent Statements**

26 Two of the ALJ's reasons concerned Plaintiff's inconsistent statements. The ALJ  
 27 first noted that Plaintiff's claim in a disability report that she had stopped working in 2009  
 28 "because of [her] condition" was inconsistent with her testimony that she did not have

1 significant symptoms until August of 2014 and with her admission that she had actually  
 2 stopped working because she was laid off. (Doc. 12-13 at 24; *and see* Docs. 12-3 at 52, 57;  
 3 12-7 at 7). This is a specific finding supported by the record regarding a prior inconsistent  
 4 statement, and is therefore a clear and convincing reason supporting the ALJ's credibility  
 5 determination.

6 Plaintiff argues that this inconsistency cannot support the ALJ's disability  
 7 determination because Plaintiff's attorney completed the disability report and might have  
 8 misunderstood her response to the question. (Doc. 20 at 22). This argument essentially  
 9 proposes a reasonable inference the ALJ could have drawn—but did not draw—from the  
 10 evidence. From the fact that Plaintiff's attorney filled out the report, a reasonable person  
 11 certainly could infer that the inaccurate statement resulted from the attorney  
 12 misunderstanding Plaintiff's truthful answer. But a reasonable person could also infer that  
 13 the inaccuracy resulted from the attorney correctly understanding Plaintiff's untruthful  
 14 answer. Because both interpretations of the record are reasonable, the Court must defer to  
 15 the ALJ's interpretation.

16 The ALJ next observed that Plaintiff's statements regarding the onset of her  
 17 migraines were inconsistent with one another. (Doc. 12-13 at 25). This is a specific, clear,  
 18 and convincing reason supporting her decision to discredit Plaintiff's symptom testimony.  
 19 As the ALJ noted, on August 28, 2014, Plaintiff reported to a treatment provider that she  
 20 had been having migraines for six months. (Doc. 12-8 at 43). However, earlier that same  
 21 month on August 1st, Plaintiff had reported having a headache “1 hour ago, but not before  
 22 hand.” (*Id.* at 5). And on August 15th, Plaintiff had reported having a headache that had  
 23 started four days prior, but “denie[d] history of health problems.” (*Id.* at 31). The ALJ  
 24 reasonably interpreted these reports as inconsistent: Plaintiff at times reported that her  
 25 migraines had begun six months prior to August 2014, but at other times made statements  
 26 which could reasonably be interpreted as indicating that she had not had migraines before  
 27 that August.<sup>1</sup>

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28 <sup>1</sup> Plaintiff argues that the ALJ's reasoning here is so unclear that the Court cannot possibly  
 assess its legitimacy. (Doc. 24 at 23). The Court, to the contrary, had little trouble

1                   ii. *Failures to Seek or Follow Treatment*

2                  The ALJ also considered several instances of Plaintiff's failure to seek or follow  
 3 treatment. This is a proper basis for her adverse credibility determination: Ninth Circuit  
 4 case law "is clear that if a claimant complains about disabling pain but fails to seek  
 5 treatment, or fails to follow prescribed treatment, for the pain, an ALJ may use such failure  
 6 as a basis for finding the complaint unjustified or exaggerated." *Orn v. Astrue*, 495 F.3d  
 7 625, 638 (9th Cir. 2007).

8                  The ALJ noted one instance in which Plaintiff failed to take prescribed medication.  
 9 (Doc. 12-13 at 25). As the ALJ recounted, Plaintiff was admitted to the emergency room  
 10 on August 15, 2014, for arm and leg pain, and was discharged with prescriptions for several  
 11 medications, including Percocet for pain relief. (Doc. 12-8 at 29–30). When she was seen  
 12 for a follow-up visit two weeks later, however, she reported that she had not taken any of  
 13 the prescribed medications.<sup>2</sup> The ALJ reasoned that claimant's failure to take the prescribed  
 14 medications suggested that her symptoms were not as severe as she had alleged. (Doc. 12-  
 15 13 at 25). The Court finds that this unexplained failure to follow a prescribed course of  
 16 treatment is a clear and convincing reason supporting the ALJ's credibility determination.

17                 Plaintiff asserts that this unexplained failure is not relevant because it occurred  
 18 before Plaintiff's alleged onset date of September 4. But Plaintiff neither explains her  
 19 assertion nor supports it with citation to authority. (*See* Docs. 20 at 24; 27 at 7). Moreover,  
 20 Plaintiff testified that the symptoms that caused her alleged disability began in August.  
 21 (Doc. 12-3 at 57). That she failed to take prescribed medication for the same symptoms  
 22 which would cause her alleged disability less than three weeks later is therefore relevant to  
 23 whether her testimony regarding those symptoms is credible. Plaintiff also argues that she  
 24 might have been hesitant to take the prescribed medication because Percocet is a narcotic

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25                 apprehending the ALJ's point and finds that it is clear enough to have the power to  
 26 convince.  
 27                 <sup>2</sup> (Doc. 12-8 at 43). Plaintiff reported during this follow-up that she had also been  
 28 prescribed and failed to take ibuprofen during the August 14th emergency room visit. (*Id.*). From the record it appears that she was actually prescribed ibuprofen on August 1st. (*Compare id.* at 1, 8, *with id.* at 30). This only reinforces the ALJ's conclusion, as it implies that she had not taken prescribed pain medication during an entire month when she was allegedly experiencing pain.

1 and because she was “in the midst of investigating what was happening with her body.”  
2 (Doc. 20 at 24). But Plaintiff also was prescribed and failed to take ibuprofen, which is not  
3 a narcotic. And in any case, this argument is merely an alternative interpretation of the  
4 record. Because the ALJ’s contrary interpretation is reasonable, the Court defers to the  
5 ALJ.

6 The ALJ also discussed an unexplained failure to follow up as directed after a  
7 medical appointment. As the ALJ noted, during a September 30, 2014 visit at Barrow  
8 Epilepsy, Plaintiff was advised to follow up in one month. (Doc. 12-8 at 71). But the record  
9 does not show another Barrow visit until February of 2015. (*See id.* at 101). The ALJ  
10 reasoned that if Plaintiff’s symptoms were as severe as she had alleged, she would have  
11 followed up within the recommended time. This unexplained failure to follow a prescribed  
12 course of treatment is a clear and convincing reason supporting the ALJ’s determination.

13 An additional reason the ALJ gave for her credibility determination was Plaintiff’s  
14 failure to contact her treating rheumatologist when her pain increased 10 days prior to a  
15 scheduled appointment. (Doc. 12-13 at 27). The ALJ reasoned that if Plaintiff’s symptoms  
16 were as severe as she had alleged, she would not have waited for her next scheduled  
17 appointment to adjust her pain medication. (*Id.*). Plaintiff argues that this is an improper  
18 reason to discount Plaintiff’s symptom testimony because it does not show that Plaintiff  
19 was not compliant with or seeking treatment. (Doc. 20 at 24–25). The Court agrees with  
20 Plaintiff. Although the ALJ’s reasoning is clear enough, the Court finds that Plaintiff’s  
21 conduct in this instance is not reasonably probative of credibility, and thus not a proper  
22 reason supporting the ALJ’s credibility determination. *See Orn*, 495 F.3d at 638 (noting  
23 that failure to seek treatment “may be probative of credibility, because a person’s normal  
24 reaction is to seek relief from pain,” but that “where the stimulus to seek relief is less  
25 pronounced, . . . [this] approach to credibility makes little sense.”). Considering the  
26 imminence of Plaintiff’s scheduled appointment and her pre-existing access to prescription  
27 pain medication, her stimulus to seek relief appears attenuated and her reaction to that  
28 stimulus entirely normal.

1       Nonetheless, this error is harmless because the ALJ’s many other reasons for  
 2 discrediting Plaintiff’s testimony are proper and supported by substantial evidence. *Cf.*  
 3 *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1163 (2008) (stating that errors  
 4 are harmless where they do not negate a credibility conclusion otherwise supported by  
 5 substantial evidence).

6       **iii. Daily Activities**

7       The ALJ further found that Plaintiff’s daily activities were inconsistent with the  
 8 claimed severity of her symptoms. (Doc. 12-13 at 27). Daily activities are a proper basis  
 9 supporting an adverse credibility determination where they “are incompatible with the  
 10 severity of symptoms alleged” or where “a claimant is able to spend a substantial part of  
 11 [her] day engaging in pursuits involving the performance of physical functions that are  
 12 transferable to a work setting.” *Ghanim*, 763 F.3d at 1165 (citing *Orn*, 495 F.3d at 639;  
 13 *Batson v. Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004)). The ALJ noted  
 14 that during the relevant period Plaintiff had reported to Barrow Epilepsy that she was a  
 15 busy stay-at-home mom and to Dr. Nolan that she did yoga or Pilates four days per week  
 16 for about an hour per day. (Doc. 12-13 at 26–27; *and see* Doc. 12-8 at 69, 115). These  
 17 reports are inconsistent with her testimony that her symptoms were so severe that she could  
 18 only lift 10 pounds, stand for 20 minutes, and walk as far as the mailbox. This is therefore  
 19 a clear and convincing reason supporting the ALJ’s credibility determination.

20       Plaintiff argues that her daily activities were actually consistent with the severity of  
 21 her alleged symptoms because at later hearings she testified that she had only engaged in  
 22 10 minutes of stretching on good days and that being a busy stay-at-home mom primarily  
 23 meant lying incapacitated in bed while her teenagers got her younger children ready for  
 24 school. (Doc. 20 at 25–26; *and see* Doc. 12-13 at 76–81). But this argument only  
 25 underscores the ALJ’s analysis by demonstrating that there are inconsistencies not only  
 26 between Plaintiff’s claimed symptoms and her reports to her medical treatment providers  
 27 but also between those reports and her later testimony. *See Revels v. Berryhill*, 874 F.3d  
 28 648, 668 (9th Cir. 2017) (citing *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001))

1 (noting that equivocation regarding daily activities can justify rejecting fibromyalgia  
 2 symptom testimony). The ALJ and not this Court is responsible for resolving such conflicts  
 3 or ambiguities. *E.g., Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ’s  
 4 determination here was reasonable, and the Court defers to it.

5 The Court finds that the ALJ gave clear and convincing reasons supported by  
 6 substantial evidence for not fully crediting Plaintiff’s testimony regarding the severity of  
 7 her symptoms.

8 **b. Medical Opinion**

9 Plaintiff also argues that the ALJ erred in giving little weight to the opinion of  
 10 Plaintiff’s treating rheumatologist, Dr. Nolan. (Doc. 20 at 14–20). Because Plaintiff’s claim  
 11 was filed before March 27, 2017, pre-2017 SSA regulations apply to her claim. *See Farlow*  
 12 *v. Kijakazi*, 53 F.4th 485, 488 & n.3 (9th Cir. 2022). Under these regulations medical  
 13 opinions are divided into three categories: “those from treating physicians, examining  
 14 physicians, and non-examining physicians.” *Valentine v. Comm’r, Soc. Sec. Admin.*, 574  
 15 F.3d 685, 692 (9th Cir. 2009) (citation omitted). The ALJ may reject a treating physician’s  
 16 opinion by giving specific and legitimate reasons based on substantial evidence so long as  
 17 that opinion is contradicted by another physician’s opinion. *Id.* Specific and legitimate  
 18 reasons include incongruity between a doctor’s opinion and his medical records or between  
 19 his opinion and a claimant’s daily activities, as well as a doctor’s reliance on a claimant’s  
 20 properly discredited reports regarding her own symptoms. *Tommasetti v. Astrue*, 533 F.3d  
 21 1035, 1041 (9th Cir. 2008); *see also Rollins*, 261 F.3d at 856. Further, an “ALJ need not  
 22 accept the opinion of any physician if that opinion is brief, conclusory, and inadequately  
 23 supported by clinical findings. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

24 Dr. Nolan’s opinion, which was a check-box form with no additional written  
 25 explanation, found that Plaintiff met the criteria for fibromyalgia, suffered from “pain  
 26 and/or fatigue” sufficiently severe to constantly interfere with attention or concentration,  
 27 and experienced frequent severe headaches, incoordination, depression, anxiety, morning  
 28

1 stiffness, low back pain, vestibular dysfunction, cognitive impairment, and numbness and  
 2 tingling in her extremities. (Doc. 12-8 at 78–80).

3       The ALJ gave specific and legitimate reasons for rejecting Dr. Nolan’s opinion. (*See*  
 4 Doc. 12-13 at 33–40). For example, the ALJ accurately noted that many of the symptoms  
 5 Dr. Nolan checked—including incoordination, depression, vestibular dysfunction,  
 6 cognitive impairment, and anxiety—were completely unsupported by his treatment notes.  
 7 Similarly, the ALJ correctly noted that Dr. Nolan’s treatment notes reflect that Plaintiff  
 8 self-reported numbness and tingling only once. (*Id.* at 35; *see also* Doc. 12-8 at 118). The  
 9 ALJ also noted that Dr. Nolan’s opinion consisted of “pre-printed symptoms . . . which  
 10 were checked as symptoms experienced by the claimant” and reasonably noted that aspects  
 11 of the opinion were conclusory and lacked explanation. (*Id.* at 33–35). Because Dr. Nolan’s  
 12 opinion was conclusory and brief, to the extent it was inadequately supported by his  
 13 treatment notes the ALJ was not obliged to accept it. *See Molina v. Astrue*, 674 F.3d 1104,  
 14 1111 (9th Cir. 2012) (“[T]he ALJ may permissibly reject check-off reports that do not  
 15 contain any explanation of the bases of their conclusions.”) (cleaned up). The ALJ therefore  
 16 gave specific and legitimate reasons for rejecting Dr. Nolan’s opinion regarding these  
 17 symptoms.

18       The ALJ also gave Dr. Nolan’s opinion less weight because he had treated Plaintiff  
 19 only three times on the date he provided his opinion. (Doc. 12-8 at 33). Plaintiff argues that  
 20 this is not a proper reason supporting the ALJ’s rejection of Dr. Nolan’s opinion. But even  
 21 the authority Plaintiff cites to support this proposition confirms that while the number of  
 22 times a physician has treated a claimant may not by itself justify rejecting that physician’s  
 23 opinion, it is certainly a relevant and permissible consideration. *See Ghokassian v. Shalala*,  
 24 41 F.3d 1300, 1304 (9th Cir. 1994) (stating that an ALJ’s error was “particularly glaring”  
 25 where “he based most of his conclusions upon the report of a first-year resident who . . .  
 26 only examined [the claimant] *once.*” (emphasis in original)); *Holohan v. Massanari*, 246  
 27 F.3d 1195, 1207 (9th Cir. 2001) (stating that a treating physician’s opinion was not  
 28 outweighed by the opinion “of an examining physician who examined [the claimant] only

1 once . . . ."); *Le v. Astrue*, 529 F.3d 1200, 1202 (9th Cir. 2008) (holding colorable an  
 2 argument that five visits over three years is not enough to make a physician a treating  
 3 source); *and see* 20 C.F.R. § 404.1527(c)(2)(i). The ALJ permissibly considered this factor.

4 The ALJ found Dr. Nolan's opinion that Plaintiff experienced frequent severe  
 5 headaches unpersuasive because it was based on Plaintiff's self-reports which, as  
 6 discussed, the ALJ properly discredited. Because Dr. Nolan's treatment records contain no  
 7 relevant clinical findings and reflect that Plaintiff self-reported her migraines, this is a  
 8 proper reason supported by substantial evidence for rejecting Dr. Nolan's opinion. *Ghanim*,  
 9 763 F.3d at 1162 (quoting *Tommasetti*, 533 F.2d at 1041) (stating that when a treating  
 10 physician's opinion is based "to a large extent" on "an applicant's self-reports and not on  
 11 clinical evidence, and the ALJ finds the applicant not credible, the ALJ may discount the  
 12 treating provider's opinion."); (*see* Doc. 12-8 at 115, 118).

13 The ALJ also rejected Dr. Nolan's opinion that Plaintiff's pain and fatigue were  
 14 severe enough that she was unable to concentrate because she testified that she engaged in  
 15 activities requiring concentration, such as driving a car. The ALJ additionally noted that  
 16 Plaintiff's cognition was assessed as "relatively normal," and cited a Mini Mental Status  
 17 Exam ("MMSE") on which she scored a five out of five on "[a]ttention/[c]alculation." (*Id.*  
 18 at 33; *see also* Docs. 12-3 at 50; 12-7 at 18; 12-8 at 82, 86). Pain or fatigue which constantly  
 19 interferes with concentration is inconsistent both with the constant concentration required  
 20 to drive a car and with five-out-of-five attention.

21 Plaintiff argues that driving a car does not show inconsistency because "Dr. Nolan  
 22 did not assess that Lacy could *never* do things that required some concentration," but was  
 23 only "asked to assess Lacy's limitations with regard to sustaining activities at a job." (Doc.  
 24 at 16). This assertion is incorrect. Question 11 of the form Dr. Nolan filled out is not  
 25 limited to job activities, but asks broadly: "How often is your patient's experience of pain  
 26 and/or fatigue sufficiently severe to interfere with attention and concentration?" (Doc. 12-8  
 27 at 80). As discussed, Dr. Nolan checked "Constantly." (*Id.*). The very next question asks:  
 28 to "what degree does your patient experience deficiencies of concentration, . . . resulting

1 in failure to complete tasks in a timely manner (in work settings *or elsewhere*)?" (*Id.*)  
 2 (emphasis added). Dr. Nolan again checked "Constantly." (*Id.*).

3 Plaintiff also argues that her MMSE result does not "invalidate Dr. Nolan's  
 4 assessment" because her ability to successfully complete an MMSE may not be  
 5 transferable to a work setting, and therefore does not necessarily demonstrate that she can  
 6 complete tasks in the context of regular employment. (Doc. 20 at 15–16). This argument  
 7 misses the mark. Whether or not Plaintiff's MMSE result shows she can do sustained work,  
 8 it certainly demonstrates an inconsistency between Dr. Nolan's opinion and other medical  
 9 evidence in the record because it suggests that Plaintiff's pain and fatigue do not  
 10 "constantly" interfere with her attention or concentration. Thus, Plaintiff's ability to drive  
 11 a car and her MMSE result are inconsistent with Dr. Nolan's opinion and support the ALJ's  
 12 decision to discount that opinion.

13 Rather than relying on Dr. Nolan's opinion, the ALJ placed great weight on the  
 14 opinions of Dr. Sapin (a state agency medical consultant) and two state agency  
 15 psychological consultants, while giving little weight to the opinion of a second medical  
 16 consultant, Dr. Woodcock, to the degree the ALJ found their opinions consistent with the  
 17 medical evidence in the record. (*See* Doc. 12-13 at 37). Plaintiff argues that the ALJ failed  
 18 to give sufficient reasons for giving Dr. Nolan's opinion less weight than he gave to some  
 19 of the consultants' opinions. (Doc. 19 at 19). But, as discussed, the ALJ gave specific and  
 20 legitimate reasons for rejecting Dr. Nolan's opinion. Further, while "the opinion of a  
 21 nonexamining physician cannot by itself constitute substantial evidence that justifies the  
 22 rejection of the opinion of . . . a treating physician," even "brief, conclusory opinions of [a]  
 23 state agency reviewing physician" can "establish a conflict among the medical opinions."  
 24 *Widmark v. Barnhart*, 454 F.3d 1063, 1065 & n.2 (9th Cir. 2006). The ALJ's resolution of  
 25 this conflict was reasonable. The Court defers to the ALJ, and finds that she did not err in  
 26 giving little weight to Dr. Nolan's opinion.

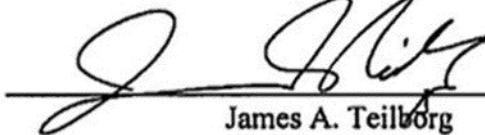
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1       **IV. CONCLUSION**

2              Based on the foregoing,

3              **IT IS ORDERED** that the Commissioner's decision is affirmed, and the Clerk of  
4 the Court shall enter judgment accordingly.<sup>3</sup>

5              Dated this 24th day of March, 2023.

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7                
8              \_\_\_\_\_  
9              James A. Teilborg  
10             Senior United States District Judge

28              

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<sup>3</sup> To the extent a mandate is required, the judgment shall serve as the mandate.